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In The

# Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

*Petitioners,*

v.

UNITED AIR LINES, INC.,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

### I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING.

#### A. The Court Should Not Treat Severe Myopia Differently Than Other Correctable Impairments.

The primary thrust of United's argument is that, even if other impairments are considered in their uncorrected state, myopia should be treated differently. United's distinction proceeds from little more than its intuitive sense that severe myopia is somehow less serious than other correctable impairments. For instance, United contrasts Pilots' impairment with the House Labor Report's example of a hearing impairment corrected with a hearing aid by baldly asserting that "in common perception" a correctable hearing impairment is "far more serious" than a correctable vision impairment. Resp. Br. 41 n.24. Even if the Court is familiar with such a "common perception," it should not substitute a rule of intuition for the EEOC's coherent guidance – consistent with the language, structure, purpose, and legislative history of the ADA – that *all* impairments must be considered in their uncorrected state in determining whether they substantially limit a person's major life activities.

United insists that Congress could not have intended the ADA to apply to some 100 million Americans who wear corrective lenses. This assertion, even if true,[1] does not address the issue before this Court. The majority rule against consideration of corrective measures does not suggest that the use of a corrective measure is itself a disability, nor have Pilots ever contended that they are disabled merely because they use corrective lenses. *See* Pet. Br. 38. Pilots simply disagree with United's assertion that the existence of an

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[1] United concedes that it is one of only a handful of employers to discriminate on the basis of uncorrected vision. Resp. Br. 11-12. Thus, even if the ADA applied in all such instances, the Act's effect would hardly be "severely diluted." *Id.* at 9.

effective corrective measure necessarily *precludes* a finding that a person is disabled.

While United attempts to lump together all Americans with less than perfect vision,[2] the ADA contemplates a spectrum of physical limitations, ranging through three categories, depending on the severity of the condition: (1) physical characteristics within the "normal" range, which are not impairments at all, *see* 29 C.F.R. pt. 1630, App. § 1630.2(h), ¶ 3 (1998); (2) limitations which qualify as impairments but are not substantially limiting; and (3) disabilities. The severity of Americans' nearsightedness falls along just such a spectrum. *See* Jean Roberts, *Binocular Visual Acuity of Adults, United States, 1960-1962* (National Center for Health Statistics, Series 11, No. 3; Public Health Service publication no. 1000, 1968), at 3 (approximating the percentage of population with vision worse than 20/40, 20/70, 20/100 and 20/200 as 24%, 16%, 6.5%, and 2.4%, respectively).

Thus, a ruling in Pilots' favor would not support the conclusion that the ADA applies to all Americans who wear glasses. Many of those who are only slightly nearsighted fall within the "normal" range, and thus are not impaired at all. United concedes that this is not true as to Pilots' vision.[3] Individuals with moderate myopia are in turn subject to the argument that, even if they are impaired, their impairments do not rise to the level of a disability. A person is not substantially limited if he can see well enough to function without

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[2] It is ironic that, having asked the Court to concern itself strictly with the facts of this case and to ignore the implications its decision will have upon other correctable impairments, Resp. Br. 7, 9, United then considers myopia only in the abstract, equating Pilots' severe myopia with "milder (and more common) uncorrected nearsightedness." *Id.* at 19.

[3] United agrees that the existence of an impairment is determined without regard to corrective measures. Resp. Br. 22 n.12. Even the court below concluded that Pilots are impaired, J.A. 58, and United does not contest that conclusion in its argument to this Court. Resp. Br. at 22 n.12.



corrective lenses, even though he uses corrective lenses in order to see perfectly[4] or to perform more easily a specific task such as reading or driving.[5] *See Taylor v. Phoenixville Sch. Dist.*, 1999 WL 184138, at *9 (3d Cir. April 5, 1999) ("[n]ot every chronic condition is a disability," only those that "substantially limi[t] a major life activity when left untreated"). This argument also does not apply to Pilots; United does not dispute that Pilots are among the small minority of Americans who, for all practical purposes, cannot see without corrective lenses.[6]

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[4] One who can see adequately but not perfectly without corrective lenses is not "significantly restricted" in the condition or manner in which he sees, whereas one who effectively cannot see at all without corrective lenses *is* "significantly restricted." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). Contrary to United's suggestion, Resp. Br. 18, 19 n.9, it is not anomalous that the provisions of the ADA extend to the latter person, even if her corrected vision might be equal to or marginally better than the former person's.

[5] There is little support for United's suggestion, Resp. Br. 19, that under the majority rule anyone who needs glasses to obtain a license to drive is necessarily disabled. *See Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998) (driving is not a major life activity), *cert. denied*, 1999 WL 25239 (Mar. 22, 1999); *Wyland v. Boddie-Noell Enters., Inc.*, 1998 WL 795173, at *2 n.1 (4th Cir. Nov. 17, 1998) (same).

[6] The ADA leaves the boundaries between the unimpaired, impaired, and disabled categories to be defined through case-by-case determination. The lower courts have, perhaps unwittingly, already begun this process. With only one exception, *Joyce v. Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) (cited at Pet. Br. 11 n.14), the cases United cites as not considering correctable nearsightedness to be a disability, Resp. Br. 7 n.2, did not involve persons with uncorrected vision worse than 20/80. *See also Kienast v. Frank*, 1990 WL 711359 (EEOC Mar. 27, 1990) (impairment so minor that employee did not wear corrective lenses through most of her employment). In contrast, *all* of the decisions that United acknowledges as holding against its position concerned more severe, although still correctable, myopia. *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829 (N.D. Ill. 1998) (20/400); *Fallacaro v. Richardson*, 965 F. Supp. 87 (D.D.C. 1997) (20/600); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898 (E.D. Pa. 1997) (20/150); *Peacock v. County of Marin*, 953

United argues that Pilots "function identically" to others with less severe myopia also corrected by glasses. Resp. Br. 19.[7] Of course, the same could be said of any number of "widely shared and easily correctable" impairments. Resp. Br. 43-44. By United's reasoning, the ADA could never protect from discrimination a person with severe but controlled hypertension, asthma, depression, hearing loss, diabetes, arthritis, or seizure disorder, because, as United's *amici* point out, in each case tens of millions of Americans use the same easily applied[8] medications or devices to correct milder cases of the same condition. *See* SHRM Br. 5-7. United has failed to identify a meaningful distinction between myopia and other correctable impairments.

### B. The Court Should Analyze Pilots' Impairment In The Uncorrected State.

Even the Tenth Circuit did not apply United's proposed rule of intuition, basing its decision instead on the conclusion that courts should *always* consider the effect of corrective measures in determining the existence of a disability. J.A. 63-65. United has failed to offer a coherent defense of this ruling.

#### 1. The Court Should Adhere To The EEOC's Permissible Construction Of The ADA.

United apparently does not dispute that the EEOC's regulations interpreting Title I of the ADA are entitled to full deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It nevertheless

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F. Supp. 306 (N.D. Cal. 1997) (20/800); *Sicard v. City of Sioux City*, 950 F. Supp. 1420 (N.D. Iowa 1996) (20/200).

[7] United makes no attempt to reconcile this assertion with its own hiring policy, which makes "allowance for the common condition of nearsightedness but screens out a substantial minority of the most myopic." Resp. Br. 49.

[8] United makes no answer to Pilots' challenge to explain why using corrective lenses is any "easier" than putting in a hearing aid or swallowing a pill. Pet. Br. 37.



contends that the Commission's rule against consideration of corrective measures in disability determinations, contained in the Interpretive Guidance issued alongside the regulations, is not.

United's assertion that merely publishing guidance in the Federal Register is not the same as following a formal notice-and-comment procedure under the APA, Resp. Br. 24, is academic. In this case, deference is appropriate because the EEOC *did* follow the proper notice-and-comment procedure. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 313-16 (1979); Pet. Br. 18-20. The Commission simultaneously published and invited comments on all of its proposed regulations, including the appendix containing its Interpretive Guidance.[9] 56 Fed. Reg. 8578 (1991) (Notice of Proposed Rulemaking, advising that Interpretive Guidance "represents the Commission's interpretation of the issues discussed"); *see also* 55 Fed. Reg. 31192 (1990) (Advance Notice of Proposed Rulemaking); *compare Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (agency's discussion of comments it previously received was published after the fact without inviting comments on the new issues discussed, see 54 Fed. Reg. 16042 (1989)).

United also argues that the corrective measures rule cannot receive *Chevron* deference, because it was not contained in the Commission's original notice. Resp. Br. 24-25. This is incorrect. The EEOC in its original notice specified that the existence of an impairment was to be determined without regard to corrective measures. 56 Fed. Reg. 8578, 8592

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[9] Among the many interested parties that submitted comments were several of United's own *amici*. *See* Comment Nos. 91-0191-ADA (EEAC), 91-0462-ADA (Chamber of Commerce), 91-0500-ADA (SHRM), 91-0541-ADA (ATA). EEAC and SHRM both commented on the contents of the Interpretive Guidance, including specifically its construction of the term "substantially limits." Comment Nos. 91-0191-ADA, at 19-20; 91-0500-ADA, at 9.

(1991). The Commission also applied this rule to determinations of whether an impairment is substantially limiting, making it clear that the inability to perform a major life activity without the assistance of corrective devices or medication is itself a substantial limitation. *Id.* at 8593 (giving examples of a person who can walk, but "in a significantly restricted manner, i.e., only with the use of prosthetic devices," and of "a diabetic who . . . can only perform major life activities with the aid of medication," and citing legislative history against consideration of corrective measures in disability determinations). Interested parties had sufficient notice of the corrective measures rule,[10] as evidenced by the fact that the Commission received dozens of comments on this specific issue. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 155 n.302 (1999).

At a minimum, United cannot avoid the substantial deference that this Court affords to an agency's interpretation of its own regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994) ("plainly erroneous" standard); *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 911 (1997) (applying plainly erroneous standard to litigating position). The Commission included the corrective measures rule to further explain Section 1630.2(j) of its regulations, which defines

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[10] The Commission's insertion of an additional phrase in its final rule, generalizing its examples to "make clear" the rule against consideration of corrective measures so that it could not be "misconstrued," 56 Fed. Reg. 35726, 35727-28 (1991), certainly does not invalidate its prior notice. After notice and comment, "[a]n agency can make even substantial changes from the proposed version, as long as the final changes are 'in character with the original scheme' and 'a logical outgrowth of the notice and comment.' " *Natural Resources Defense Council v. EPA*, 824 F.2d 1258, 1283-84 (1st Cir. 1987) (citations omitted); *see also Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540 n.95 (D.C. Cir. 1983). To prohibit agencies from clarifying proposed rules in response to comments would largely defeat the purpose of the notice-and-comment procedure.



"substantially limits" to include those who are "significantly restricted" in the condition or manner in which they perform a major life activity.[11]

Finally, United argues that even if *Chevron* applies, the EEOC's rule is contrary to the conclusion that "emerges" from a careful analysis of the statutory text, structure, and purposes. Resp. Br. 26-27. But under *Chevron*, the proper inquiry is not what is the best interpretation of the statute, but rather whether Congress has "directly spoken to the precise question at issue." 467 U.S. at 842-43. Because Congress did not directly address the precise issue of corrective measures, the Court should apply the Commission's permissible construction of the statute. *Id.* at 843 & n.11.

### 2. The Language Of The ADA Supports Consideration Of Disabilities In The Uncorrected State.

The Commission's construction of the ADA is permissible. The language and structure of the ADA amply support the rule against consideration of corrective measures.

The EEOC construes "substantially limits a major life activity" as encompassing the inability to accomplish an act without use of a corrective measure.[12] This construction is consistent with those words' ordinary meaning. The need to

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[11] United argues that the corrective measures rule *really* interprets the underlying statute, not the Commission's own regulation, Resp. Br. 25, but this cuts against its own *Chevron* argument. Either the corrective measures rule is part and parcel of the agency's rulemaking on the statutory gaps Congress intended the EEOC (and the Department of Justice, which joined in the corrective measures rule) to fill, in which case *Chevron* applies, or the Commission was correct to label it merely a guideline interpreting the actual regulations.

[12] United insists that this eliminates the import of the word "substantially." Resp. Br. 27-28. That is not true. Under the EEOC's construction, a person with a mild impairment who remains physically able, even without corrective measures, to perform all major life activities is *not* substantially limited.

rely upon a corrective measure is a significant restriction on a person's ability to perform major life activities.

United responds that Pilots' impairment does not affect them in fact, but only hypothetically. According to United, the phrase "substantially limits" restricts the scope of the Act to those, such as paraplegics and the blind, with impairments so severe they cannot be overcome, no matter what ameliorative measures they take. Resp. Br. 27-28.[13] This is squarely at odds with Congress' intent *not* to limit the scope of the ADA only to such traditional disabilities; *see School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 280 n.5 (1987) (statutory definition not limited to "traditional handicaps"). United emphasizes that Congress placed the phrase "substantially limits" in the present tense, but Pilots do not contend that their vision was limited in the past or that their vision will be limited in the future. Pilots' severe myopia today prevents – present tense – them from being able to see without resorting to corrective measures. Of course, this Court has already concluded in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196 (1998), that Congress' use of the present tense does not exclude from the definition of "disability" even asymptomatic HIV, the most serious negative effects of which will appear in the future.

Moreover, United cannot avoid the violence their construction would do to the structure of the ADA. For instance, under United's construction of the Act, an impaired person who is substantially limited in the ability to work in a class of jobs, but who can and does work in that class of jobs with a reasonable accommodation, is by definition not disabled, because he is not "substantially limited in *doing* the things

[13] United also invokes the phrase "major life activities of such individual," Resp. Br. 28-29, but this does nothing to support its position. The words "major life activities" are not pertinent, since both parties agree that seeing is a major life activity. As to the requirement that courts analyze the circumstances specific to each individual, it is United which disregards this instruction by asserting that all correctable vision impairments are indistinguishable. Resp. Br. 19.



other people *do*." Resp. Br. 29 (emphasis in original). United argues that no court would reach such an absurd result, Resp. Br. 37-38, *but that is exactly the point*. United's construction of the Act, if applied faithfully, would *not* "produc[e] a substantive effect that is compatible with the rest of the law," *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (quoted by United).

Similarly, the statutory definition of "disabled" protects from discrimination not only those who are actually disabled, but also those who have a "record" of a disability, even though it has been permanently corrected. Nothing in the structure of the Act suggests that Congress wished to include persons whose impairments are permanently corrected, while subjecting to discrimination persons whose impairments are not cured but only controlled on an ongoing basis.[14] If Congress had indeed intended this surprising result, there were numerous simple ways for it to so specify. *See* Pet. Br. 35.[15]

[14] United ignores Pilots' illustration of the anomalous results this gap would create, Pet. Br. 33-34, and substitutes that of a blind person whose vision is partially restored but remains severely impaired. Because this person remains actually disabled, the "record of" a disability prong never comes into play. Alter United's example slightly, however, and the anomaly reappears: Assume two pilots formerly had very poor, uncorrectable vision. One pilot's vision is permanently corrected by laser surgery, but United refuses to hire her because her eyesight was poor prior to surgery (which, incidentally, Pilots understand is indeed United's policy). In the second pilot's case, technology advances such that the vision impairment becomes correctable with contact lenses. United also refuses to hire this pilot because of her poor uncorrected vision. Under United's construction of the Act, the first pilot is protected against United's discrimination because of her "record of" a disability, but the second pilot has no recourse.

[15] United claims that the rule against consideration of corrective measures also creates an anomaly, in that a person with an impairment that is not substantially limiting, but the treatment of which is, would purportedly not be disabled. Resp. Br. 30-31. The term "disabled," however, typically does not extend to temporary conditions. 29 C.F.R. pt. 1630, App. § 1630.2(j), ¶ 3 (1998). Thus, the example assumes a treatment

For its part, United contends that the EEOC's construction of the ADA, as applied to the severely myopic, is contrary to the Act's introductory finding that "some 43,000,000 Americans have one or more physical or mental disabilities." 42 U.S.C. § 12101(a)(1) (1994). United has not disputed, however, the most recent estimate that approximately 8 million Americans share Pilots' severe vision impairment, not at all disproportionate with the total estimate of 43 million disabled. David J. Lee, et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552, 554 (1998). There is in any event little to be gained by tracking down the precise categories of persons included in the 43 million estimate. Congress intentionally chose *not* to define specific categories of disabled persons in the Act, electing instead to employ a broad definition of the group it wished to protect from discrimination. *See* Harkin Br. 5-9. Moreover, even in the unlikely event that any members of Congress attempted to determine whether the estimate included severe but correctable vision impairments, as explained in the margin, they met with no success.[16]

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with long-term effects more debilitating than the underlying impairment, which no rational person would elect to undergo.

[16] Assuming United has correctly traced Congress' figure to a previous estimate of 36 million disabled in *On the Threshold of Independence*, Resp. Br. 20, that report merely repeated the same estimate from an earlier report entitled *Toward Independence*. *See* National Council on Disability, *On the Threshold of Independence: Progress on Legislative Recommendations from Toward Independence* 12-13 (1988). The later report also stated that the estimate was "roughly validated" by a telephone survey, which simply asked respondents to state whether they had a physical disability, including a visual impairment. *Id.* The earlier report gave no source for the 36 million number, although it did recite an estimate of 8.2 million Americans with visual impairments. National Council on Disability, *Toward Independence: A Report to the President and to the Congress of the United States* 6 (1986). Although the 8.2 million figure was not expressly identified as including or excluding correctable



United also relies on Congress' general statements that the disabled have historically faced disadvantages, but Congress' purposeful use of broad, generalized language – that society has "tended" to discriminate against disabled persons, who "as a group" have faced disadvantages – belies any attempt to fashion a requirement that each particular segment of disabled persons demonstrate a history of discrimination. 42 U.S.C. § 12101(a)(2), (6) (1994). Even if this were required, the record does not support United's assertion that Pilots have suffered no hardship from their vision impairment. Resp. Br. 9. To the contrary, Pilots have encountered pervasive discrimination in the form of "exclusionary qualification standards and criteria" in their chosen field, 42 U.S.C. § 12101(a)(5) (1994), which has prevented them from achieving a lifelong goal and barred them from obtaining the prestigious, highly-paid employment for which they are well-qualified, to their great economic detriment. United's assertion that Pilots' impairment is not commonly singled out by society at large does not relieve it from responsibility for its conduct.

### 3. United's Assertion That Congress Intended To Exclude Severe Myopia Is Contrary To The Relevant Legislative History And Statutory Purposes.

United does not contest that the House Labor Report and House Judiciary Report endorsed the rule against consideration of corrective measures.[17] *See* Pet. Br. 21-24. Its

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impairments, it was listed alongside statistics of several other commonly correctable conditions, including 17 million hearing impaired, 26.8 million with arthritis, 24.3 million with hypertensive disease, and 16.4 million with heart disease. *Id.* All of these numbers were in turn drawn from Mathematica Policy Research, *Digest of Data on Persons with Disabilities* (1984), which defined an impairment as "a chronic or permanent defect," but again did not distinguish correctable and uncorrectable vision impairments. *Id.* at 2 & Table I.A.1.

[17] United does dispute that the Senate report in the prior session did the same, arguing that the report discussed only "reasonable

dismissal of the only explicit congressional discussion of the issue before this Court as mere "snippets," and its assertion that the reports' examples of impairments corrected by medication or a hearing aid are distinguishable from impairments corrected by "taking a few pills or putting on . . . glasses," Resp. Br. 42, are unconvincing in the extreme.[18]

This legislative history confirms Congress' intent not to overturn prior case law under the Rehabilitation Act, in which courts and litigants repeatedly assumed potentially correctable impairments to be handicaps. See Pet. Br. 25-26.[19] United claims that courts were divided on this issue under the Rehabilitation Act, Resp. Br. 42 n.25, but cannot cite even a single decision prior to 1990 squarely holding that a correctable impairment was not a handicap, even though substantially limiting in the uncorrected state.[20]

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accommodations or auxiliary aids" provided by the employer. Resp. Br. 40. However, the House reports also refer to "reasonable accommodations or auxiliary aids," and then give as examples hearing aids and medication for diabetes. *See also* Pet. Br. 22 n.23.

[18] United quotes a list in the House Labor Report of reasonable accommodations that an employer might be expected to provide to visually impaired persons, which includes such items as electronic aids and brailled material, but not glasses and contact lenses. Resp. Br. 19-20. This merely reflects the fact that corrective lenses, like wheelchairs and hearing aids, are personal use items employees must acquire themselves.

[19] United takes issue with one of the decisions cited by Pilots, *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), arguing that plaintiff's controlled epilepsy was a handicap only because it remained substantially limiting even in the corrected state. The court, however, did not suggest that this was required to reach its result, and it cited multiple other decisions finding epilepsy to be a handicap without regard to the plaintiff's success in controlling the condition. *See, e.g., Mantolete v. Bolger*, 767 F.2d 1416, 1418 (9th Cir. 1985) (cited in *Reynolds*) (assuming plaintiff to be handicapped even though "her epilepsy was adequately controlled").

[20] The two pre-1990 vision cases cited by United did not so hold. Neither decision found the plaintiff's minor nearsightedness to be substantially limiting even in the uncorrected state. *See Trembczynski v.*



As this case illustrates, the legislative history against consideration of corrective measures furthers Congress' goal of disallowing "exclusionary qualification standards and criteria." 42 U.S.C. § 12101(a)(5) (1994). United claims that its position furthers the "competing value" of allowing employers "general discretion to make employment decisions based on physical characteristics." Resp. Br. 33. The fact that Congress chose to exclude from the scope of the Act "minor, trivial impairment[s], such as a simple infected finger," H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334, does not at all suggest that Congress ever intended to promote the questionable "value" of allowing physical criteria that are not "job-related and consistent with business necessity." *Id.* at 56, 1990 U.S.C.C.A.N. at 338.

United's construction not only fails to advance the purposes of the Act, it actively undermines those purposes. United's position is that courts should analyze only the corrective measures a person actually uses, regardless of what other measures are reasonably available. Resp. Br. 35. This approach would generate indefensible results[21] and create significant disincentives for disabled persons to seek to correct their handicaps. United does not dispute that its rule creates such a disincentive; it merely hopes that the disincentive will not be great enough to affect the behavior of disabled persons. Resp. Br. 36-37. There is little basis for United's

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*City of Calumet City*, 1987 WL 16604 (N.D. Ill. Aug. 31, 1987) (holding that vision better than or equal to 20/40 was not an impairment); *Padilla v. City of Topeka*, 708 P.2d 543 (Kan. 1985) (holding that uncorrected binocular vision of 20/50 was not a handicap).

[21] Under this rule, a disabled person who seeks out a means of correcting her condition thereby forfeits the protection of the Act, while one who eschews treatment does not, contrary to this Court's observation that "the disability definition does not turn on personal choice." *Bragdon v. Abbott*, 118 S. Ct. at 2206.

optimism,[22] nor does it explain why Congress would have purposefully created an incentive against the treatment of disabilities, without expressly stating or explaining this intention.

## II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING.

In its response, United defends the result, but not the reasoning, of the lower court's dismissal of Pilots' claim that United regarded them as disabled. It advances two new arguments against the regarded as claim. First, United asserts that it merely applied "physical standards" to select the most qualified applicants. Resp. Br. 48. Second, it contends that the Tenth Circuit erred in defining the relevant class of jobs as all pilot positions at all airlines. Resp. Br. 49. Both arguments at best raise issues of fact.

### A. Pilots Have Adequately Alleged That United Falsely Perceived Them To Be Unfit.

United concedes that employees who are not substantially limited by an impairment are still protected "[i]f their employers discriminate against them because of a misunderstanding of their condition." Resp. Br. 35. Pilots allege just such discrimination here. United denies these allegations, claiming that it did not regard Petitioners as physically unfit to be pilots, but merely sought to select the best candidates for its positions. This factual assertion cannot support dismissal of Pilots' claims at the pleadings stage. Fed. R. Civ. P. 12(b)(6).

United misstates the issue when it contends that an employer who deems a person physically unsuited for

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[22] It is not far-fetched to imagine a disabled person, faced with difficulty finding employment and encountering (according to United) entirely lawful discrimination, being forced by economic necessity to give up an important but not life-sustaining corrective device such as a prosthesis or hearing aid.



employment does not "necessarily" or "by definition" regard that person as disabled. Resp. Br. 35 n.19, 44. To prevail on a motion to dismiss, United must convince the Court that as a matter of law a person with a controlled impairment can *never* be regarded as disabled, whenever the employer asserts – without need for evidentiary support – that the person is relatively unsuited physically for the relevant class of jobs.

United offers absolutely no authority to support the notion that an employer's application of such physical criteria is unassailable as a matter of law. Indeed, not one of the cases it cites in its discussion of the "regarded as" prong was decided on a motion to dismiss.[23] Whether an employer's physical standard reflects a perception of a disability or merely legitimate concerns about the employee's relative fitness for the job is a factual question to be decided on the evidence presented to the trial court. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 628-30 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

United and its *amici* offer any number of examples where a physical standard might be related to a legitimate job qualification: a pilot who is afraid to fly, an inferior baseball player, a supermarket stocker too short to reach the shelves, a Broadway singer who can't sing. Resp. Br. 47-49 & n.28; EEAC Br. 29. But Pilots have alleged that the standard at issue here is *not* related to their job qualifications, and reflects only myth, stereotype, and unsubstantiated fears. J.A. 24-25, ¶ 28. Based upon unfounded safety concerns, United

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[23] Notably, United quotes *Cook v. State of R.I., Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 26 (1st Cir. 1993), in support of a distinction between a perception that an applicant is substantially limited in working in a class of jobs and a perception that an applicant will not excel at a particular job. The court in *Cook* concluded, however, that to apply this distinction, "each case must be determined on its own facts." *Id.* The issue therefore "fell squarely to the jury," and the court affirmed a jury verdict for an employee who was perceived to be substantially limited in working. *Id.* at 25-26.

believed Pilots to be, and treated them as, substantially limited in the ability to perform the type of work at issue. J.A. 24-26, ¶¶ 38, 39. These allegations do not "raise an interesting philosophical question" as to whether United perceived Pilots to be substantially limited in the ability to fly, Resp. Br. 47; they raise a critical *factual* question.

United's defense of its vision standard on a motion to dismiss is particularly suspect in that United presumes that the standard furthers safety concerns. United simply disregards Pilots' factual allegations (and the FAA's conclusion) that there is *no* safety justification for its policy. If this allegation is true, then United's policy cannot possibly further the goal of hiring only the best applicants. Indeed, given that it makes no attempt to explain why its policy applies only to new applicants and not to existing pilots in its own fleet,[24] it is difficult to give credence to United's claim that its physical standards are intended to enhance safety rather than merely reduce its own costs.[25] *See* Pet. Br. 5, 8 & n.8.

Under the terms of the Act, qualification standards that tend to screen out the disabled must be justified as "job related" and "consistent with business necessity." 42 U.S.C. §§ 12112(b)(6), 12113(a) (1994). If United honestly believes there is a safety concern, it may defend its conduct on remand by meeting its burden of *proving* the affirmative defense of a direct threat to safety. 42 U.S.C. § 12113(b) (1994); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999);

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[24] The Air Transport Association infers that incumbent pilots have learned safety procedures to offset the effects of their impairment. ATA Br. 25 n.26. Petitioners cannot conceive what safety procedures United might have to offset its (unfounded) fear of "a vision failure at an acutely dangerous moment," Resp. Br. 12, nor any reason why new applicants could not be instructed in such procedures as a reasonable accommodation.

[25] Moreover, if United's minimum standards are intended "to provide the public with the *safest* air transportation," Resp. Br. 48 (emphasis in original), it is strange that United imposes minimal flight experience requirements, J.A. 19, far less than other global airlines, or even the regional airlines for which Petitioners have served as captains.



*Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758, 764 (5th Cir. 1996); *see also* Labor Report at 58 (employers may not act only on "generalized fears about the safety of the applicant"). As this Court has instructed, for United to prevail on this defense, "the district court will need to conduct an individualized inquiry and make appropriate findings of fact." *Arline*, 480 U.S. at 287.[26] The "determination cannot be based merely on an employer's subjective evaluation." *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985); *see also Knapp v. Northwestern Univ.*, 101 F.3d 473, 483 (7th Cir. 1996) (same), *cert. denied*, 520 U.S. 1274 (1997).

To adopt United's view that employers are entitled as a matter of law to screen applicants on the basis of physical standards would render the "regarded as" prong meaningless. *See Knapp, supra* ("[a]ny physical qualification based on risk of future injury must be examined with special care if the [ADA] is not to be circumvented"). According to United, an employer is always entitled to screen applicants it subjectively believes will not "excel" in the area of safety, even if the supposed safety concern has no basis in fact. Any employee who alleged that he was regarded as substantially limited in working because the employer incorrectly viewed him as a safety threat would face an automatic Rule 12(b)(6) dismissal. This view would leave the protection of the "regarded as" provision of the ADA entirely hollow.

### B. The Tenth Circuit Correctly Defined The Relevant Class Of Jobs.

The Tenth Circuit defined the relevant class of jobs requiring similar training, knowledge, and skills to include

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[26] United's *amicus* ATA argues that requiring United to make such an evidentiary showing would create a disincentive against high safety standards, ATA Br. 24, reasoning which applies as easily to the actually disabled prong. There is no basis for exempting the airline industry as a whole from the ADA.

"all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines." J.A. 71-72. United asserts that other airline jobs such as training, management, and administrative positions should be included. This argument also raises a factual question inappropriate for determination on a motion to dismiss, and in any event it does not alter the fact that United regarded Pilots as substantially limited in the major life activity of working.

United's claim that it did not perceive Pilots to be unfit for various non-flying positions which require similar training, knowledge, and skills again raises issues of fact. First, there is a factual question as to whether Petitioners' training, knowledge, and skills pertain to non-flying positions. *See* J.A. 24, ¶ 38(a) (United viewed Pilots as unfit "to perform the type of work at issue here"). "Because a 'person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled,' " this inquiry requires an "individualized assessment." *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784-85 (3d Cir. 1998) (quoting *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996)). Petitioners are highly trained to *fly aircraft*, J.A. 19-20, not to be teachers or corporate managers or administrators. They are entitled to offer evidence that the categories of jobs United suggests do not involve the same skills and abilities.[27]

Second, even if there are non-flying positions involving Petitioners' piloting skills and abilities, a question of fact remains as to whether United perceived Pilots as qualified for such non-flying positions. *See* J.A. 19, ¶ 15 (United applied

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[27] Even in *Witter v. Delta Air Lines*, 138 F.3d 1366 (11th Cir. 1998), the court defined a broader class of jobs only at the summary judgment stage, after considering the evidence presented, including the plaintiff's own testimony that his training encompassed certain non-flying positions, and the lack of any evidence that defendant excluded him from those positions. *Id.* at 1370.



the same qualification standards to all flight officer positions).[28]

Moreover, even if the relevant class of jobs includes certain non-flying positions, United still regarded Petitioners as disabled in the ability to work. Pilots need not show that United regarded them to be utterly unable to work within the relevant class of jobs, *Bragdon v. Abbott*, 118 S. Ct. at 2206, but only substantially limited in the ability to work in that class. This burden of showing an impact on a class of jobs was "not intended to require an onerous evidentiary showing." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 340-41 (1998); *McKay v. Toyota Motor Mfg., U.S.A.*, 110 F.3d 369, 378 (6th Cir. 1997). Surely being unfit to fly an airplane would be a substantial limitation on Petitioners' ability to work in the class of jobs requiring one to be trained, knowledgeable, and skillful as a pilot.[29] *Compare Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998) (holding that a teacher who was disqualified from classroom teaching positions but could work as a tutor or administrator had raised a material issue of fact whether he was disabled).[30]

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[28] There is nothing in the record to suggest that United distinguishes between flying and non-flying positions requiring any level of piloting experience. United lists no separate job category for flight trainers or instructors, instead apparently filling such positions from its pool of flight officers. *See* United Air Lines, Brief Airline Job Descriptions, <http://www.ual.com/airline/our_company/descriptions.asp>. All flight officer positions require vision no worse than 20/100. United Air Lines, Flight Officer Positions, <http://www.ual.com/airline/our_company/officer.asp>.

[29] Conversely, a person whose vision would prevent him from flying an airplane is not substantially limited in working in a relevant class of jobs if he has *not* been trained as a pilot. *Burbank v. City of Idaho Falls*, 1996 WL 518098 (9th Cir. Sept. 11, 1996) (relied upon by United).

[30] Pilots' position is analogous to a lawyer informed midway through his career that he could no longer practice law or work in any position that requires membership in the bar. Even if he could find work as an office manager for a law firm, as an editor for a legal publisher, or as a bar review instructor, his perceived impairment still "constitutes for the particular

Nearly any employer could point to a handful of teaching or administrative or other tangentially related positions that a rejected employee could fill. Congress cannot have intended for the "regarded as" provision to be so easily circumvented.

Respectfully submitted this 12th day of April, 1999.

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person a significant barrier to employment." *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986).